

United States Senate

WASHINGTON, DC 20510

1155

November 19, 2015

Chairman Tom Wheeler
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Chairman Wheeler:

We write to you today regarding the authority granted to the Federal Communications Commission's (FCC's) Enforcement Bureau (EB). As members of the Senate Commerce Committee, we are committed to exercising full oversight over the EB to ensure there is complete fairness and transparency related to its activities.

The FCC's enforcement authority is a key component to ensuring compliance with the nation's communications policy set forth by Congress in the Communications Act of 1934 and other statutes. As part of that process, each year, hundreds of thousands of Americans file complaints with the FCC about potential violations of key rules. Since you assumed the chairmanship in November 2013, the FCC has received over 564,000 consumer complaints. Yet, the FCC's track record in taking enforcement action in response to actual complaints filed at the agency remains unclear. Naturally, consumers making the effort to file a complaint expect the agency to protect their interests. As such, we are interested in ensuring that FCC enforcement actions are pursued and carried out in an objective manner based upon tangible evidence of misconduct.

However, concerns have been raised about the EB aggressively pursuing substantial, unprecedented, and seemingly arbitrary fines against licensees and non-licensees alike. While the mission of the EB is to ensure compliance with the Communications Act and the FCC's rules, we are concerned that the EB is exceeding its authority by undertaking "fishing expeditions" rather than investigating specific violations based upon tangible evidence of misconduct. Moreover, it appears that the EB is more concerned with issuing fines and grabbing headlines than it is with ensuring compliant behavior with existing FCC rules.

Most recently this was made evident when the FCC chose to issue a fine against a company for the use of deauthentication technology even in the absence of clear rules governing the use of such technology, or whether the alleged use of such technology even falls within the scope of the FCC's authority. Rather than undertake a rulemaking or proceeding to delineate the rules of the road for companies to adhere to, as requested by several of the FCC's Commissioners, the FCC issued a Notice of Apparent Liability (NAL) for alleged conduct that does not fall under any existing FCC rules.

To advance our understanding of the FCC's enforcement processes and activities, we seek your timely response to the following requests for information:

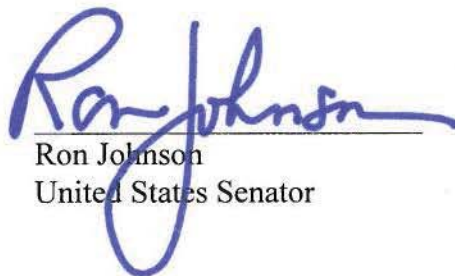
- 1) What are the FCC's internal rules and procedures for conducting investigations and taking enforcement actions, including the calculation of forfeiture orders? What policies and procedures does the FCC's EB have in place to ensure its activities comply with the statute and the FCC's rules? What objective criteria is the EB required to follow to determine (1) which actions to pursue and (2) the basis upon which alleged misconduct is evaluated?
- 2) Describe your strategy for carrying out the FCC's enforcement responsibilities, as well as the FCC's enforcement actions in response to consumer complaints, and explain how the FCC is working to implement this strategy.
- 3) Please provide copies of any directions, instructions, or guidance that both your office and the EB has provided, either externally or internally, concerning enforcement actions, investigations, and plans for responding to consumer complaints.
- 4) Explain how EB actions are communicated to the other FCC Commissioners prior to their release. How much notice is each FCC Commissioner afforded on items that do not require a vote by the full Commission?
- 5) Identify every FCC enforcement action (*e.g.*, consent decree, forfeiture order, notice of apparent liability, etc.) resulting in a monetary penalty of \$1 million or more over the last ten years. For each such action, provide the date, the penalty amount, and an explanation of how the FCC calculated the monetary penalty.
- 6) As underscored in a recent *Politico* article, the EB does not consistently follow through with collection of fines. Please identify every NAL proposing a forfeiture of more than \$100,000 issued since 2005. Of such NALs, please identify those that led to a forfeiture order. Of such forfeiture orders, please identify the recovery status for each. Please identify every civil suit brought to-date to recover forfeitures.
- 7) Please provide the legal justification for imposing a penalty on a company in the absence of specific FCC rules governing such conduct.

We appreciate your assistance with these requests and ask for your response no later than December 3, 2015. Thank you for your cooperation in this matter.

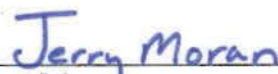
Sincerely,




Dean Heller
United States Senator



Ron Johnson
United States Senator


Jerry Moran
United States Senator


Roy Blunt
United States Senator


Steve Daines
United States Senator



FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

December 18, 2015

The Honorable Ron Johnson
United States Senate
386 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Johnson:

Thank you for your letter regarding the Commission's enforcement process. We share the same desire to protect consumers, safeguard competition, secure communications networks, and police the integrity of Commission funds, programs and services. One of my main priorities as Chairman is that consumers are protected from behavior such as intrusive robocalls, fraudulent charges from cramming and slamming, and 911 system outages.

As Chairman, I am committed to the strong enforcement of consumer protection and competition laws and regulations. The Enforcement Bureau's actions are rooted soundly in statutory authority and Commission rules. I have provided detailed answers to each of your questions below. Attached to this letter is a disc containing approximately 200 pages of documents that are responsive to your information request.

I hope we can continue to discuss how the Commission can work to best protect consumers and the networks individuals and businesses rely on every day. Please don't hesitate to let me know if I can provide further assistance.

Sincerely,

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Tom Wheeler



FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

December 18, 2015

The Honorable Jerry Moran
United States Senate
345 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Moran:

Thank you for your letter regarding the Commission's enforcement process. We share the same desire to protect consumers, safeguard competition, secure communications networks, and police the integrity of Commission funds, programs and services. One of my main priorities as Chairman is that consumers are protected from behavior such as intrusive robocalls, fraudulent charges from cramming and slamming, and 911 system outages.

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Tom Wheeler



FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

December 18, 2015

The Honorable Roy Blunt
United States Senate
260 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Blunt:

Thank you for your letter regarding the Commission's enforcement process. We share the same desire to protect consumers, safeguard competition, secure communications networks, and police the integrity of Commission funds, programs and services. One of my main priorities as Chairman is that consumers are protected from behavior such as intrusive robocalls, fraudulent charges from cramming and slamming, and 911 system outages.

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

December 18, 2015

The Honorable Dean Heller
United States Senate
361-A Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Heller:

Thank you for your letter regarding the Commission's enforcement process. We share the same desire to protect consumers, safeguard competition, secure communications networks, and police the integrity of Commission funds, programs and services. One of my main priorities as Chairman is that consumers are protected from behavior such as intrusive robocalls, fraudulent charges from cramming and slamming, and 911 system outages.

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

December 18, 2015

The Honorable Steve Daines
United States Senate
1 Russell Courtyard (Temp)
Washington, D.C. 20510

Dear Senator Daines:

Thank you for your letter regarding the Commission's enforcement process. We share the same desire to protect consumers, safeguard competition, secure communications networks, and police the integrity of Commission funds, programs and services. One of my main priorities as Chairman is that consumers are protected from behavior such as intrusive robocalls, fraudulent charges from cramming and slamming, and 911 system outages.

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Tom Wheeler

1) **What are the FCC's internal rules and procedures for conducting investigations and taking enforcement actions, including the calculation of forfeiture orders? What policies and procedures does the FCC's EB have in place to ensure its activities comply with the statute and the FCC's rules? What objective criteria is the EB required to follow to determine (1) which actions to pursue and (2) the basis upon which alleged misconduct is evaluated?**

The FCC's Enforcement Authority and Guidelines. Section 1 of the Communications Act of 1934 (the Act) gives the Federal Communications Commission (FCC) the general authority to “execute and enforce” the provisions of the Act.¹ While the Act contains a number of sections that allow the FCC to assess penalties for specific types of conduct,² the Commission also assesses forfeiture penalties pursuant to Section 503(b) of the Act.

Section 503(b) authorizes the FCC to assess monetary forfeitures against persons who willfully or repeatedly:³

- fail to comply with the terms and conditions of any Commission-issued license, permit, certificate or other instrument or authorization, or
- fail to comply with the Act, the Commission’s rules, or any Commission-issued regulation or order.⁴

Section 503(b) lists maximum monetary penalties for different types of violators and violations. The table below lists the current, inflation-adjusted maximum 503(b) penalties. In determining the amount of a penalty, the Commission or its designee must, by law, take into account “the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”⁵ Any monetary forfeiture that the Commission imposes must be at or below the statutory maximum for the violation.

In 1997, the FCC adopted a “Forfeiture Policy Statement” establishing guidelines for the Commission to consider when determining Section 503(b) liability amounts for violations of the Act or the FCC’s rules. The purpose of the statement and guidelines is to “provide the needed measure of predictability to the process and uniformity to our administrative sanctions while

¹ 47 U.S.C. § 151.

² A full listing of these statutory forfeiture provisions, including the penalty amounts, is provided in Section 1.80 of the Commission’s rules, which is attached to this response. These statutory forfeiture amounts are periodically adjusted for inflation pursuant to the Debt Collection Improvement Act of 1996. 28 U.S.C. § 2641 note (2014) (Federal Civil Penalties Inflation Adjustment).

³ See 47 U.S.C. § 312(f)(1) (defining “willful”).

⁴ 47 U.S.C. § 503(b)(1).

⁵ 47 U.S.C. § 503(b)(2)(E).

retaining flexibility for the Commission to act appropriately in particular cases.”⁶ Updated versions of these guidelines can be found in the Commission’s current rules as a note to Section 1.80(b)(8). Both the 1997 Policy Statement and Section 1.80 of the Commission’s rules are attached to this response.

CURRENT MAXIMUM 503(b) FORFEITURE PENALTIES

<u>Violator/Violation</u>	<u>Maximum penalty for violation or day of continuing violation</u>	<u>Maximum penalty for single, continuing violation</u>
503(b)(2)(A) – broadcaster, cable operator	\$37,500	\$400,000
503(b)(2)(B) – common carrier	\$160,000	\$1,575,000
503(b)(2)(C) – broadcast of obscene, indecent, or profane language	\$350,000	\$3,300,000
503(b)(2)(D) – violators not covered by (A), (B), or (C)	\$16,000	\$122,500
503(b)(2)(f) – manufacturers violating accessibility requirements	\$105,000	\$1,050,000

The guidelines provide a non-exhaustive list of violations and base forfeiture amounts for each violation.⁷ These base amounts are significantly lower than the Section 503(b) maximum forfeiture amounts listed above. For example, the base forfeiture for the transmission of indecent or obscene material is \$7,000 per violation, while the base forfeiture for failing to respond to FCC communications is \$4,000. The guidelines also list specific criteria for both upward and downward adjustment that the Commission and EB may consider to adjust these forfeiture base amounts.

The upward adjustment criteria are:

- Egregious misconduct;
- Ability to pay/relative disincentive;
- Intentional violation;
- Substantial harm;
- Prior violations of any FCC requirements;

⁶ *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17092-3 (1997), *recons. denied*, 15 FCC Rcd 303 (1999).

⁷ For violations that are not covered by the Section 1.80, base forfeiture amounts are established on a case-by-case basis.